

Policy for Responding to Finding an Illegal Pesticide Residue Resulting from Treatment of a Commodity with a Pesticide Not Registered for That Use

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| Introduction | This policy was developed to provide direction on how the Department of Pesticide Regulation (DPR) will respond to illegal pesticide residues where a commodity was treated with a pesticide not registered for that plant, crop or commodity (hereafter referred to as commodity). |
| Authority to Act | DPR's authority to act on illegal residue events is found in Food and Agricultural Code (FAC) sections 12601, 12642, and 12648. |
| FAC section 12601 | The general authority to act on illegal residue is found in FAC section 12601. The traditional routine procedure for responding to a finding of illegal residue is found in FAC sections 12601-12606. These sections outline a comprehensive due process procedure that allows DPR to seize and hold the produce and includes provisions for commodity reconditioning or byproduct use. This section does not authorize DPR to order the disposal or destruction of the commodity. |
| FAC section 12642 | FAC section 12642 declares that any produce with an illegal residue is a public nuisance. The following sections (FAC 12643-12646) outline the procedure for DPR to take legal action to force disposal or destruction of the commodity. |
| FAC section 12648 | <p>FAC section 12648 addresses the situation where the produce was "intentionally" treated with a pesticide that was not registered for that commodity. This section does not use the word "intentionally" but does appear to contemplate residue from "intentional" use rather than accidental contamination by use of the word "treated".</p> <p>Produce treated with a pesticide not for that registered commodity is defined to be a public nuisance by FAC 12648(a). This section gives DPR the authority to seize and hold the produce, requires DPR to provide a hearing to the owner or person in control of the produce to challenge the seizure, and provides DPR with significant additional powers regarding the disposition of the produce.</p> |

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FAC section 12648 (continued)

In addition, FAC section 12648 subsection (b) establishes two rebuttable presumptions (an assumption that is made that will stand as a fact unless someone comes forward to contest it and prove otherwise) that if the produce is treated with a pesticide not registered for that use:

1. The contaminated produce presents a hazard.
2. The pesticide was used to gain an unfair business advantage.

After due process procedures outlined in FAC 12648(c), DPR can:

1. Order destruction of the produce
 2. Prohibit harvest or sale of produce grown on the site
 3. Prohibit use of the site for any specified plant back period
 4. Take any other appropriate measure
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NTE Residues Resulting from Unintentional Use

DPR will handle “no tolerance established” (NTE) residue events that may have resulted from drift or other unintentional contamination pursuant to FAC section 12601. This section can be used even when there is some evidence of an illegal use. This would allow for reconditioning of the commodity, in these cases.

NTE Residues Resulting from “Intentional” Treatment

DPR will use the disposal and other provisions authorized by FAC section 12648 whenever it can be proven that the produce was treated with an unregistered pesticide.

FAC section 12648 sets forth that a commodity is to be declared a public nuisance and may be seized by the Director when treated with a pesticide not registered for use on that plant, crop, or commodity. Where DPR can prove that the commodity was treated with a pesticide that is not registered or is not registered for that use, DPR will use the authority vested by FAC section 12648 pursuant to the guidelines outlined in this policy. To establish this fact, DPR inspectors will rely on residue evidence (laboratory analysis), testimony, pesticide use records, and such other evidence as can be discovered as in any other investigation.

Due Process

Where the evidence shows that it is more likely than not that the pesticide residue is the result of an unlawful “treatment” under FAC section 12648, DPR will adhere to the following “due process” procedures:

- Notice and Seizure
 - Hearing
 - Appeal
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Notice and Seizure

Notice as required by statute to the owner or person in control of the commodity shall be made prior to seizure, unless the Director has reason to believe that prior notice will result in loss of control of the commodity.

The notice shall allege that the commodity was treated with a pesticide not registered for use on that commodity, describe the evidence upon which the allegation is based, and inform the owner or person in control of the commodity of their right to a hearing.

DPR will then seize the commodity.

The respondent must request a hearing within 15 days of receipt of the notice.

Hearing Waived

If the respondent does not request a hearing, the Director may take any of the actions described in the statute, including destruction of the commodity as described in the chart below.

Hearing and Determination

If the owner requests and appears at a hearing:

- DPR need only show that the commodity was treated with a pesticide and that pesticide was not registered for use on that commodity.
- The Director shall render a written decision.
- If the pesticide residue is found unlawful under FAC section 12648, the Director may take any of the actions listed in the statute, including destruction of the commodity or other appropriate measure. Rebuttal of the two presumptions (hazard to human health and unfair business advantage) at hearing may be used to determine the appropriate action.

Please Note:

If the Director determines the illegal residue did not result from the intentional use of a pesticide not registered for use on the commodity and the commodity is no longer marketable due to storage or inability to harvest on time, the DPR could be subject to an action for compensation under the Governmental Tort Claims Act for damage to the commodity before its release.

Appeal

Appeal may be made to the appropriate court for a review of the Director's decision. If the court determines there was not substantial evidence presented at the hearing to support the allegation of illegal treatment with a pesticide not registered for use on that commodity, the DPR could be subject to an action for compensation under the Governmental Tort Claims Act for damage to the commodity before its release.

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Crop / Commodity Disposition

After a final determination of illegal treatment under FAC section 12648, and the appropriate action is “destruction of the commodity”, disposition of the crop should be based on the guidelines outlined in the following table, with exceptions approved by DPR’s Enforcement Branch Chief where the situation warrants.

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| Single-Harvest Commodities | Destruction of all commodities (harvested or un-harvested). |
| Multi-Harvest Commodities | <ul style="list-style-type: none"> • Destruction of currently marketable commodity (harvested and un-harvested). • Strip all immature commodity from the plant. Continue stripping immature commodity until grower’s test (using an acceptable laboratory) shows there is no longer any residue. • Consider destruction of the plants if the potential for unfair business advantage warrants it. |
| Long-term/Permanent Tree or Vine Commodities | <ul style="list-style-type: none"> • Destruction of currently marketable commodity (harvested and un-harvested). • Tree or vine destruction is not normally a reasonable option. Strip all immature commodity from the plant. Continue stripping immature commodity until grower’s test (using an acceptable laboratory) shows there is no longer any residue. This may mean grower’s testing of the crop produced following year. |